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No. 345

In the

Supreme Court of the United States

October Term 1959

LEROY J. ABT,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner, LeRoy J. Abt, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered June 3, 1959, wherein petitioner was plaintiff, and The United States was defendant.

OPINIONS BELOW

The opinion of the United States Court of Claims has not yet been reported, and for convenience is printed in an appendix filed with this petition. There is also printed

in said appendix a copy of the opinions of the General Accounting office and of the Comptroller General of the United States, which latter opinion constituted a final determination of petitioner's claim administratively.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the United States Court of Claims is dated June 3, 1959, and it was entered on that date.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28 USC 1255. (June 25, 1948, Ch. 646, sec. 1, 62 Stat. 928.)

QUESTIONS PRESENTED FOR REVIEW

1. Was the President of the United States authorized in 1943, in time of war, to appoint and commission petitioner, other than as a regular army officer, under Section 127a of the National Defense Act, as amended by Section 20 of the Act of June 15, 1933, (10 USC 513), or was the President *required* to make such appointment under the Joint Resolution of Congress of 22 September 1941?

2. Did the Secretary of War, acting through the Adjutant General *require* that all persons commissioned as officers during the World War II emergency be appointed in the Army of the United States under the Joint Resolution of Congress dated 22 September 1941 and was said directive binding on Overseas Theater Commanders?

3. Was petitioner in a military status between July 1, 1948 and February 24, 1951 as a result of his appointment as a Captain in the Army of the United States, under Section 127a of the National Defense Act, on October 8, 1943 or was his military status terminated July 1, 1948 the effec

tive date of the repeal of The Joint Resolution of Congress of September 22, 1941.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The following Statutes and Executive Orders are involved and are set forth in the appendix.

(1) Section 127a of the National Defense Act, as amended, (10 USC 513).

(2) The Joint Resolution of September 22, 1941, (55 Stat. 728).

(3) Section 1(c) of the Emergency Powers Continuation Act of 1952, (66 Stat. 333; 10 USC 352).

(4) Executive Order of the President No. 10397, September 25, 1952.

(5) Executive Order of the President No. 10441, March 31, 1953.

STATEMENT OF MATERIAL FACTS

World War II was officially terminated on April 28, 1952, by Presidential Proclamation No. 2974, 66 Stat. c 31, in which the President proclaimed that the national emergencies declared to exist by Proclamation 2352, September 8, 1939, (54 Stat. 2643), and Proclamation 2487, May 27, 1941, (55 Stat. 1647), "terminated this day upon the entry into force of the Treaty of Peace with Japan". Section 1 (c) of the Emergency Powers Continuation Act, 66 Stat. 333, 10 U.S.C. 352, provided, however, that notwithstanding the termination on April 28, 1952, of the state of war with Japan and the national emergencies mentioned above, and notwithstanding any proclamations of peace with respect to such war, the President was authorized to continue in effect until and including April 1, 1953, all appointments as officers or warrant officers of the Army and the Air Force

which would terminate after April 27, 1952, and before April 1, 1953, under certain provisions of law including Section 127a of the National Defense Act. Such extension to April 1, 1953, was provided for in Executive Order No. 10397, September 25, 1952.

Petitioner accepted an appointment as a 1st. Lieutenant in the Army of the United States on 11 June 1942, and entered on active duty on 24 June 1942. On 8 October 1943 while serving overseas in the North African Theater of Operations he was promoted to Captain by the Commanding General of the North African Theater of Operations by direction of the President. The pertinent portion of the order for petitioner's promotion contained the following:

> By direction of the President and under the provisions of Section 127a, National Defense Act, as amended, you are temporarily promoted - - - - - in the Army of the United States - - - - This promotion, unless sooner terminated, will terminate automatically at the expiration of the emergency and six months thereafter - - - -

On 3 March 1947, petitioner received a commission from the President confirming the appointment made in 1943, the pertinent part of which contained the following:

> I do appoint him, temporarily, Captain in the Army of the United States, such appointment to date from the eighth day of October, nineteen hundred and forty three - - - This commission to continue in force during the pleasure of the President of the United States, for the time being, and for the duration of the present emergency and for six months thereafter unless sooner terminated.

Petitioner continued on active duty until relieved therefrom on 3 December 1944, at which time his orders among other things stated:

The temp. apmt in the AUS of this officer will continue in force during the period of the present emergency and for six (6) months thereafter unless sooner terminated by DP." (DP meant "Direction of the President.") On 19 October 1950, petitioner was appointed a Captain in the United States Air Force Reserve which appointment he accepted on 24 February 1951. He was on active duty training from 15 May 1951 to 12 August 1951. On 23 October 1951 he was promoted to Major in the Air Force Reserve, Judge Advocate General's Department, and is still serving on active duty in that grade.

In computing petitioner's pay for longevity purposes, the government has refused to credit petitioner for the period from 1 July 1948 through 23 February 1951, on the assumption that petitioner was appointed as a Captain on 8 Oct. 1943 under the Joint Resolution of Congress of September 22, 1941 and that his status as an officer terminated on 1 July 1948, that being the date Congress fixed for the termination of appointments under the Joint Resolution.

Petitioner submits that he was not appointed under the Joint Resolution of September 22, 1941, (55 Stat. 728), but that he was legally appointed as Captain under Section 127a of the National Defense Act, as amended, (10 USC 513), as stated in the official letter of appointment received by him when appointed. Petitioner further submits that inasmuch as World War II appointments made under Section 127a of the National Defense Act, as amended, (10 USC 513), continued until the termination of the war (April 28, 1952) and six months thereafter (October 28, 1952), and were further extended up to and including April 1, 1953, by virtue of Section 1 (c) of the Emergency Powers Continuation Act of 1952, (66 Stat. 333; 10 USC 352), as implemented by Executive Order No. 10397, dated September 25, 1952, petitioner's appointment as

Captain remained in full force and effect to February 24, 1951.

Petitioner submits that he is entitled to credit for longevity from 4 July 1948 through 23 February 1951, by reason of having been in a commissioned status, although not on active duty during that time.

The question having been determined adversely to petitioner by the Comptroller General, suit was filed in the United States Court of Claims, which court denied petitioner's claim, and dismissed petitioner's petition.

BASIS OF JURISDICTION IN THE COURT OF CLAIMS

The basis for federal jurisdiction in the United States Court of Claims was Section 1491, Title 28 USC (June 25, 1948, Ch. 646, 62 Stat. 949, as amended July 28, 1953, Ch. 253, Section 7, 67 Stat. 226; September 3, 1954, Ch. 1263, Section 1 (a and b, 68 Stat. 1241); Title I and Section 202 (a) (2), of Title II, of the Career Compensation Act of 1949, (Act of October 12, 1949, 63 Stat. 802, 37 USC 231), as amended, and other pertinent statutes and regulations.

ARGUMENT

1. Appointments by the President during war time could be made either under the National Defense Act or under the Joint Resolution of Congress.

Prior to the enactment of the Joint Resolution of Congress the President was only authorized to make appointments in the Army of the United States in time of war under Sec. 127a of the National Defense Act, which reads in part as follows:

> *In time of war* any officer of the Regular Army appointed to higher temporary grades and *all other persons appointed as officers*, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of Brigadier General shall be made by the President alone - - - - provided that an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination. (Emphasis ours).

The Joint Resolution of September 22, 1941, was enacted to extend the war-time power of the President to make temporary appointments of officers in the Army of the United States, during the then existing emergency. This appears from a statement by the sponsors of the Joint Resolution, appearing in the Congressional Comment on this Resolution in U.S. Code Congressional Service, 77th Cong. 1st Sess., 1941, page 797; where it is said in pertinent part:

> "The War Department, in submitting this measure (the Joint Resolution) for the consideration of Congress, pointed out that existing provisions of law authorize temporary appointments in the Army of the United States as distinguished from appointments in the components of such Army *in time of war*, and that the enactment of this joint resolution would merely extend such authority to include the present emergency." (parenthesis and emphasis ours).

In implementing the Joint Resolution, the War Department, on October 27, 1941, in Army Regulations No. 605-10 explicitly stated that the provisions of those regulations were not applicable to temporary appointments in the Army of the United States made under authority other than under the Joint Resolution.

This language in the implementing regulations clearly recognized that the power to appoint temporary officers in the Army of the United States, was not to be exclusively exercised under the Joint Resolution.

After the United States passed from an Emergency to a state of war, the President had two methods of exercising his choice in making temporary appointments or promotions. One was under Section 127a of the National Defense Act, and the other under the Joint Resolution of September 22, 1941.

In *Miley* v. *Lovett*, 193 F2d 712, Cert. den. 72 S. Ct. 366, 342 U.S. 919, 96 L. Ed. 687, the U.S. Circuit Court of Appeals, Fourth Circuit, speaking of the above cited Joint Resolutions, said:

> "These resolutions mentioned above . . . did not purport to repeal, and did not repeal . . . Section 127a of the National Defense Act."

The conclusion of the United States Court of Claims that Section 127a, National Defense Act, as amended (10 USC 513), does not authorize appointments in the Army of the United States, in time of war, of persons other than Regular officers to a higher temporary grade, is an erroneous conclusion. The Judge Advocates General of Army and the Air Force have consistently ruled in various opinions that Section 127a, National Defense Act, authorizes original appointments in the Army of the United States, in time of war, of civilians, including even the appointment of aliens. Additionally, it has been held that Section 127a, National Defense Act, also authorizes the temporary promotion of Army of the United States officers, in time of war, to a higher temporary grade in the Army of the United States.

The Departments of the Army and the Air Force, respectively, have consistently followed the aforesaid rulings of the Judge Advocates General of the Army and the Air Force holding that Section 127a, National Defense Act, as amended, constituted basic authority, in time of war, to make original appointments and temporary promotions in the Army of the United States.

On 8 September 1958 the Continental Air Command issued a supplement to Air Force Regulation 15-38 dated 9 April 1958 which in Paragraph 2a recognized war time appointments under Sec. 127a of the National Defense Act and stated the following:

(3) *Army of the United States without component.*

(d) Appointments under the provisions of Section 127a, National Defense Act of 1916, continued in force through 1 April 1953.

A Regulation such as is above quoted, issued by the military services, has been held by this Court to have the force and effect of law. (*Standard Oil Co. v. Johnson*, 316 U.S. 481, 86 L. ed 1611, 62 S. Ct. 1168)

The Judge Advocates General, in several opinions, recognized that there was authority to make appointments under the National Defense Act. These opinions are cited because under the rulings of this Court, such opinions are entitled to great weight (See *Hall v. Brown* (1950), 339 U.S. 103, 94 L. Ed 691, 70 S. Ct. 495, and *Hironimus v. Durant* (1948), 4th Cir., 168 F. 2d 288, cert. denied 335 U.S. 818, 93 L. Ed. 373, 69 S. Ct. 40).

On 27 July 1950, the Judge Advocate General of the Army in an opinion, JAGA 1950, 1641, Vol. IX, No. 4, par 2160, page 255, Bulletin of the JAG stated as follows:

> Commissions in the Army of the United States granted officers pursuant to the provisions of par. 7, Sec. 127a of the National Defense Act, supra, and which have not been terminated are now and will continue in effect until six months subsequent to the legal termination of World War II. Such officers should be treated in the same manner as members of the Officers' Reserve Corps."

The Judge Advocate General of the Air Force on October 17, 1950, in opinion JAGAF 1950/94, 2 Dig JAGAF, par 619, held that:

> "Appointments in the Army of the United States under par 7, Section 127a, National Defense Act, are still in effect."

The Judge Advocate General of the Army on October 20, 1952, in opinion JAGA 1952/7086, 2 Dig Ops, Officers, Section 77.1, held that:

> "A temporary promotion made under subsection 127a of the National Defense Act, supra, unless sooner terminated, continues in effect for the duration of World War II and six months thereafter (28 October 1952) and has now been extended until 1 April 1954 by the Emergency Powers Continuation Act, supra, as implemented by Executive Order No. 10397, supra."

The above opinion of The Judge Advocate General of the Army, dated October 20, 1952, is on all fours with your petitioner's case, as petitioner was temporarily promoted in the Army of the United States to the grade of Captain, on October 8, 1943, specifically under the provisions of Section 127a, National Defense Act, as amended.

The right of the President to make appointments such as petitioner received, was also recognized by Congress in Section 1 (c) (1), of the Emergency Powers Continuation

Act, 66 Stat 333, 10 USC 352, where Congress gave authority to the President to continue up to and including April 1, 1953, all appointments made in the Army of the United States *including those appointments made under the provisions of Section 127a, National Defense Act, as amended.* (10 USC 513).

This Congressional authority was acted on by President Truman, in Executive Order No. 10397, dated September 25, 1952, when he extended to April 1, 1953, all appointments of officers that were made pursuant to Section 127a of the National Defense Act, as amended, (10 USC 513), and a further extension to July 1, 1953, was provided for in Executive Order No. 10441 March 31, 1953, by President Eisenhower as to those in a missing status, but appointed under Section 127a of the National Defense Act.

The conclusion reached by the Court of Claims, that the President was only authorized under Section 127a of the National Defense Act to appoint Regular Army officers to temporary higher grades, in time of war, is also contrary to the understanding of Congress, as is evident from a report of the Judiciary Committee of the Senate, when Congress codified the laws relating to the Armed Forces. In that report it was said, that new 10 USC 3447(b) replacing Sec 127a of the National Defense Act, (10 USC 513) made

> "express the authority heretofore implied to appoint persons other than commissioned officers of the Regular Army." (Senate Report 2484 81th Cong. 2nd Sess. Calendar No. 2521 p. 227).

Furthermore, the Legislative History of Section 1 (c) of the Emergency Powers Continuation Act, 66 Stat 333, 10 USC 352, Vol. 2, Page 1940 of the U. S. Code Congressional and Administrative News, 82nd Cong. 2nd Sess. 1952 also confirms the fact that appointments other than

temporary appointments of Regular Army officers under Section 127a of the National Defense Act could be made. It was there stated:

> Appointments as officers and warrant officers of the Army of the United States and of the United States Air Force, including appointments as officers and warrant officers in the Organized Reserve Corps, the Air Force Reserve, the National Guard of the United States, and the Air National Guard of the United States, are limited by these provisions to a maximum duration of the war or emergency during which they were appointed plus 6 months; *an appointment (or temporary rank made in time of war) shall continue until six months after its termination.* (10 USC 513) (Italics ours)

Since it is a well established principle in law that official acts or duties of public officers will be presumed to have been properly performed (*Rose* v. *Stewart*, 227 US 530, 33 S. Ct. 345, 57 L. Ed. 626) and that everything done by an officer in connection with his official act in the line of his duty was legally done. (*U. S.* v. *Elton*, 222 Fed. 428; *Perowich* v. *Perry*, 167 Fed. 789, 93 CCA 209), the presumption of regularity if not rebutted, is conclusive. Under these principles petitioner's appointment under the National Defense Act must be presumed to have been legally made, and the burden of showing that the official act was irregular rests on him who asserts it was unlawful or irregular (*Knox County* v. *N. Y., etc. Bank*, 147 US 91, 13 S. Ct. 267, 33 L. Ed. 93).

The burden of disproving the legality of petitioner's appointment under the National Defense Act, was not met by the government, for in the decision of the Court of Claims there is no explanation why appointments under Sec. 127a of the National Defense Act, made by the President, in time of war, were recognized, confirmed, extended,

and treated as valid and legally effective over a period of many years, if such appointments could not be made legally.

In view of the appointment of petitioner in time of war under the specific authority of Sec. 127a of the National Defense Act; the subsequent formal confirmation of his appointment in 1947 by the President; the legislative history of the Act; the interpretations placed upon it by the highest legal officers of the Army and Air Force; the Act of Congress authorizing the President to extend appointments under Section 127a of the National Defense Act to April 1, 1953 and to July 1, 1953; and the Executive Orders of two Presidents providing for such extensions, there appears to be no foundation whatsoever for the conclusion of the Court of Claims that the President had no power in time of war, to appoint officers, other than regular Army officers to temporary higher grades, under the National Defense Act, but that he was required to appoint them pursuant to the Joint Resolution of Congress.

It is submitted that the President had the right and the power to make temporary promotion appointments under either the Joint Resolution or the National Defense Act. Since petitioner's appointment was stated in his official orders to be under the National Defense Act it cannot be said to have been made under the Joint Resolution of Congress.

2. The policy directive of the Secretary of War dated November 7, 1941, that all persons commissioned as officers during the "present emergency" be appointed under the Joint Resolution of Congress, was not mandatory on the Headquarters, North African Theater of Operations, United States Army, in 1943, where petitioner was appointed under Section 127a National Defense Act.

The conclusion of the Court of Claims that the policy directive of the Secretary of War *required* all appointments in the Army of the United States be made under the Joint Resolution is not correct.

The Secretary of War's directive of November 7, 1941, was explicity limited to the period of "the present emergency". It had no language indicating that such emergency policy was to continue, if and when the United States became involved in war. Nor was there any reference in the policy directive indicating that if and when war was declared, the statutory power of the President to make war time appointments under the National Defense Act could not be exercised.
the National Defense Act could not be exercised. In addition, the directive was by order of the Secretary of War and not by Direction of the President. Therefore any later action of the President, as occurred when petitioner was appointed, superseded the directive insofar as the two conflicted.

Furthermore, the Secretary of War's directive was not circulated to or mandatory on overseas theaters, as Theater Commanders operated under directives from the Joint Chiefs of Staff and the Commander in Chief. Consequently the policy directive of the Secretary of War in November 1941, was not applicable to General Eisenhower as Commander of the North African Theater of Operations in 1943 where petitioner was appointed (in time of war). The Theater Commander

had a right to make the appointment in question under Section 127a of the National Defense Act, as he was directed to do so by the President, regardless of the policy directive above mentioned.

The policy directive of the Secretary of War in any event could not deprive the President of his freedom of choice, in war time, of using either of two available statutes, the National Defense Act, or the Joint Resolution in making appointments. As was said in *United States* v. *Doherty*, 5 USCMA 287:

> "While a declaration of policy by a service may influence the manner in which an officer exercises his discretion, it cannot place him in a mental straight jacket which denies to him any freedom of choice."

Under the foregoing reasoning, the President was not deprived of his statutory power to appoint petitioner under the National Defense Act, even if it could be maintained that the emergency policy directive of the Secretary of War, applied to an Overseas Theater Commander in time of war.

3. Petitioner was in a military status between July 1, 1948 and February 24, 1951.

In petitioner's case, his appointment under Section 127a of the National Defense Act, as amended, (10 USC 513), could not be terminated before the end of the Emergency and six months thereafter, except by direction of the President, unless of course, Congress sooner repealed Section 127a, of the National Defense Act. As neither of these contingencies occurred, petitioner was in a military status from July 1, 1948 to February 24, 1951, and entitled to longevity pay credits and entitled to an adjustment of his active duty pay as demanded in the Court of Claims.

The rights of pay, longevity credits, and credits toward retirement privileges vested in petitioner, flowing from the National Defense Act appointment are vested property rights based on unrepealed federal statutes (*Whiting Admrx. v. U. S.*, 35 Ct. Cl. 301). Under the fifth amendment to the constitution, petitioner may not be deprived of such rights without due process of law.

The decision of the Court of Claims not only affects petitioner, in these very substantial rights, but also affects many officers now drawing retired pay under Title III Public Law 810, as now codified in 10 USC 1331, in cases where such officers were appointed under Section 127a of the National Defense Act, and were credited for service after July 1, 1948, the date the Joint Resolution was repealed, many of whom will be removed from the retired list as a result of such decision.

The decision of the Court of Claims in *petitioner's* case, deprives him not only of the trivial refund of pay he claims, but also deprives him of a military status covering the period from July 1, 1948 through February 23, 1951, with the result that petitioner can not attain 20 years of satisfactory Federal service, but can only attain a total of 19 years, 0 months, and 18 days, of satisfactory Federal service by the time petitioner reaches the age of 60 years on February 21, 1964, for retirement under Title III, Public Law 810, 80th Congress, 2d Session, as amended (10 USC 1331), thus depriving petitioner of retirement.

This is a most untenable situation, where, relying on the unrepealed provisions of the National Defense Act, the formal orders of the President of the United States, and the authorized officers of the military establishment, petitioner, after having accepted and acted upon an official appointment, for many years, is told that his formal order of appointment was something different than indicated by the plain language of the appointment; and that various

statutory rights pertaining to such appointment may not be claimed thereunder.

CONCLUSION

For the reasons stated, we respectfully submit that this court in its sound discretion should grant this petition for certiorari so that the question of law, as to the legality of petitioner's temporary appointment as Captain on 8 October 1943, in time of war, by the President under the National Defense Act, may be authoritatively and finally determined.

ROWLAND W. FIXEL
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Detroit 26, Michigan

APPENDIX

GENERAL ACCOUNTING OFFICE DECISION DENYING PETITIONER'S CLAIM

SETTLEMENT CERTIFICATE

United States
General Accounting Office
Washington 25, D. C.

Apr. 18, 1957
(Date)

In correspondence
please refer to:
Division: Claims
Claim No. Z-1819905

Leroy J. Abt, Major, AO 90 8389
Headquarters Tenth Air Force
Office of Staff Judge Advocate
Selfridge Air Force Base, Michigan

Sir:

Your claim for $156.00, representing difference in longevity pay between 10 and 12 years service for period January 1, 1956 to October 31, 1956, as major, United States Air Force, is disallowed for the reasons stated below.

Statement of service of March 1, 1956, issued by the Assistant Air Adjutant General, shows that for the period July 1, 1948 to February 23, 1951, you were without military status, since your Army of the United States wartime appointment of October 8, 1943, in the grade of captain, terminated and ceased to exist on July 1, 1948. It is your

contention that inasmuch as that appointment was made under the provisions of section 127a, National Defense Act, as amended, 10 U. S. C. 513, your military status was not terminated effective July 1, 1948, but continued through February 23, 1951.

In 35 Comp. Gen. 191 it was held that persons whose military status depended solely on appointments as officers of the Army of the United States without component, made under the act of September 22, 1941, would not continue to be officers after July 1, 1948. Also, it is understood that most of the appointments in the Army of the United States, which were issued after the commencement of World War II, did not mention the statutory authority under which they were issued.

Your appointment of October 8, 1943, was issued under the provisions of section 127a of the National Defense Act, as amended; however, there is a reasonable doubt that section 127a, as amended, contained authority for the appointment of officers in the Army of the United States without component. Accordingly, there is no basis for the allowance of your claim.

Respectfully,

COMPTROLLER GENERAL
of the UNITED STATES
By: R. O. McLAUGHLIN

COMPTROLLER GENERAL'S DECISION DENYING PETITIONER'S CLAIM

COMPTROLLER GENERAL
OF THE UNITED STATES
Washington 25

(SEAL)
B-131997 August 16, 1957

Major LeRoy J. Abt, USAF
Headquarters Tenth Air Force
Selfridge Air Force Base, Michigan

Dear Major Abt:

Further reference is made to your letter of May 13, 1957, requesting review of settlement dated April 18, 1957, which disallowed your claim for additional pay for the period January 1 to October 31, 1956, based on the difference in longevity pay of 10 and 12 years of service.

Your claim appears to be based on your view that your status as an officer in the Army of the United States without component initiated by your appointment as a first lieutenant, Army of the United States, pursuant to letter orders of June 9, 1942, (apparently under the act of September 22, 1941, 55 Stat. 728), and temporary promotion to the rank of captain, Army of the United States, on October 8, 1943 (stated to have been effected under section 127a of the National Defense Act, as amended, 10 U.S.C. 513) did not terminate on June 30, 1948, but continued through February 23, 1951. It is reported that you accepted an appointment as captain, Air Force Reserve, on February 24, 1951.

In our decision of October 7, 1955, 35 Comp. Gen. 191, we indicated that the question of whether paragraph 7 of section 127a of the National Defense Act, as amended, contained authority for the appointment of civilians as officers

in the Army of the United States without component was sufficiently doubtful to warrant a negative conclusion by us, pending an ultimate decision by the courts, and that appointments in the Army of the United States without component made under authority of the act of September 22, 1941, terminated on June 30, 1948. For the reasons stated in that decision we are still of the same view and, in the absence of an authoritative court decision requiring a different view, it is concluded that you had no status in the Army of the United States from July 1, 1948, to February 23, 1951.

Concerning your references to sections 3441 and 3444 of the new Title 10, U. S. Code, it appears that such provisions of law can have no bearing on your claim, since they were codified from Title V of the Officer Personnel Act of 1947, 61 Stat. 833. You received no temporary appointment or promotion under those statutory provisions and your temporary promotion to the grade of captain was not continued under section 515(c) of that act, since you held no permanent grade. 10 U.S.C. 3445 was codified from paragraph 7 of section 127a of the National Defense Act, as amended, and paragraphs (a) and (b) provide as follows:

> "(a) In addition to appointments authorized under section 3442 of this title, in time of war or of national emergency declared by the President, a regular officer or a reserve warrant officer may be appointed in a temporary grade that is higher than his regular or reserve grade, without vacating that grade.
>
> "(b) In addition to appointments authorized under subsection (a) of this section, and sections 3442, 3443, and 3444 of this title, in time of war a person who holds no commissioned grade in the Regular Army may be appointed in any temporary, commissioned grade."

In enacting the new Title 10, U. S. Code, it was the legislative intent to restate the law without substantive change. Section 49a of the act of August 10, 1956, 70A Stat. 640. While the above-quoted provisions of law contain different phraseology than was used in paragraph 7 of section 127a of the National Defense Act, as amended, the principal change referred to on page 217, House Report No. 970, to accompany H. R. 7049, later enacted into law as the act of August 10, 1956, was to make "express the authority, heretofore implied, to appoint persons other than commissioned officers of the Regular Army." Such implied authority apparently refers to the "other persons" mentioned in paragraph 7 of section 127a of the National Defense Act. They were regarded in our decision of October 7, 1955, as members of the Officers' Reserve Corps of the National Guard; the language used in 10 U.S.C. 3443(b) referring to a "person who holds no commission in the Regular Army" does not furnish a sufficient basis for a conclusion that, in originally enacting paragraph 7, the Congress intended to authorize appointments of civilians in the Army of the United States without component. Compare 10 U.S.C. 3444(a), which authorizes the temporary appointment of "any qualified person, including a person who is not a Regular or a Reserve."

It appearing that your status as an officer in the Army of the United States without component necessarily was based on authority contained in the act of September 22, 1941, it is concluded that such status terminated on June 30, 1948. Accordingly, the settlement of April 18, 1957, is sustained.

Very truly yours,

FRANK H. WEITZEL
Assisting Comptroller General
of the United States

DECISION OF THE UNITED STATES COURT OF CLAIMS DENYING PETITIONER'S CLAIM

(Decided June 3, 1959)

(CAPTION OMITTED)

MARIS, Circuit Judge (Ret.), sitting by designation, delivered the opinion of the court:

The plaintiff, a major in the United States Air Force Reserve on active duty, seeks to recover additional longevity pay based on an additional service period of two years, seven months and twenty-three days to which he claims to be entitled but which the Government has refused to credit to him. The period in question ran from July 1, 1948, to February 23, 1951, during which time the plaintiff asserts, and the Government denies, that he was in commission as a captain in the Army of the United States. The plaintiff does not contend that he was on active duty during that period.

It appears from the pleadings that the plaintiff accepted appointment as a 1st Lieutenant in the Army of the United States on June 11, 1942, and entered on active duty on June 24, 1942. On October 8, 1943, he was promoted to captain in the Army of the United States, effective on that date, for the duration of the emergency and six months thereafter. He continued on active duty until relieved therefrom on December 3, 1944. On October 19, 1950, the plaintiff was appointed a captain in the United States Air Force Reserve, which appointment he accepted on February 24, 1951. He was on active duty for training from May 15, 1951, to August 12, 1951. On October 23, 1951, he was promoted to major. He was ordered to active duty as a major on April 7, 1952, and is still serving on active duty in that grade.

The basic facts not being in dispute, both the plaintiff and the Government have moved for summary judgment.

The case turns upon the answer to the question whether the plaintiff's commission as a captain in the Army of the United States continued in effect after July 1, 1948, and until February 24, 1951, when he accepted appointment as a captain in the United States Air Force Reserve. The answer to this question in turn depends on whether the plaintiff's appointment on October 8, 1943, during wartime as a captain in the Army of the United States was made under the authority of the Joint Resolution of September 22, 1941, 55 Stat. 728, as the Government contends, or whether it was made under the seventh paragraph of section 127a of the National Defense Act, 41 Stat. 785, as amended by section 20 of the Act of June 15, 1933, 48 Stat. 161, as the plaintiff urges. For the Joint Resolution of September 22, 1941, was repealed effective July 1, 1948, by section 2a of the Joint Resolution of July 25, 1947, 61 Stat. 451, and the Government contends that the commissions issued under the authority granted by the Joint Resolution of September 22, 1941, necessarily terminated upon its repeal, unless saved by other legislation of which there was none applicable to the plaintiff's case.

It appears that the plaintiff's promotion to captain in the Army of the United States was stated in the letter of October 8, 1943, which he received from the Headquarters, North African Theatre of Operations, United States Army, to have been made "under the provisions of Section 127a, National Defense Act, as amended." This is the basis of his claim to have been appointed under the seventh paragraph of section 127a of the National Defense Act, as amended. The Government, however, contends that the seventh paragraph of section 127a, as amended, did not itself authorize any appointments except the appointment

in time of war of Regular Army officers to higher temporary grades. The Government urges, therefore, that in spite of the specific reference to section 127a contained in the plaintiff's appointment letter of October 8, 1943, the appointment must in fact have been made under the authority given by the Joint Resolution of September 22, 1941, which did confer upon the President specific power, during the emergency, to make temporary appointments as officers in the Army of the United States from among any qualified persons.

The provisions of the seventh paragraph of section 127a of the National Defense Act, as amended, and of the Joint Resolution of September 22, 1941, are set out in a footnote.[1] After careful study of them we are satisfied that the Government's contention is correct.

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[1] The seventh paragraph of section 127a of the National Defense Act, as amended by section 20 of the Act of June 15, 1933, was as follows:

"In time of war any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade and all other persons appointed as officers shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone and general officers by and with the advice and consent of the senate: *Provided*, That an appointment other than that of a member of the Regular Army made in time of war shall continue not [illegible] six months after its termination and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor." 48 Stat. 161-162.

The Joint Resolution of September 22, 1941, was as follows:

"That during the present emergency, temporary appointments of officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe

Turning to the language of the seventh paragraph of section 127a, as amended, it will be observed that the first sentence did confer authority to make appointments in time of war. But this authority is confined to the appointment to higher temporary grades of officers of the Regular Army. On the other hand, the Joint Resolution of September 22, 1941, conferred authority during the existing emergency to appoint any qualified person as an officer in the Army of the United States and provided for his pay, allowances, rights, privileges and benefits. The plaintiff relies on the second and third sentences of the seventh paragraph of section 127a, which read as follows:

> In time of war all officers of the Regular Army appointed to higher temporary grade, and all other persons appointed as officers, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone. . . . : *Provided*, That an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination, if he makes application therefor.

Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate. *Provided*, That any appointment made under the provisions of this [illegible] may be vacated at any time by the President and if not sooner vacated shall terminate upon the present emergency and six months thereafter. *Provided further*, That any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service. *And provided further*, That nothing contained in this Act shall be construed to prohibit the appointment of officers in the various components of the Army of the United States in accordance with existing laws." 55 Stat. 728-729

We think, however, that the provisions just quoted were not intended to provide new or additional authority for the appointment of officers but were designed merely to insure that all officers who might be appointed under any statutory authority in wartime (except those permanently appointed in the Regular Army) should be commissioned in the Army of the United States to serve until six months after the termination of the war. *Miley* v. *Lovett*, 4 Cir. 1952, 193 F. 2d 712, cert. den. 342 U.S. 919. The reference in the second sentence to "any officer of the Regular Army appointed to higher temporary grade" obviously refers to such officers appointed under the authority expressly conferred by the first sentence of the paragraph. By the same token the reference in the second sentence to "all other persons appointed as officers" must refer to persons appointed under some other statutory authority. For the sentence itself gives no authority to appoint such persons but merely requires that if they are appointed it shall be in the Army of the United States.

At the time of the enactment of the seventh paragraph of section 127a of the National Defense Act in its amended form by the Act of June 15, 1933, 48 Stat. 161, sections 37 and 38 of the National Defense Act authorized the appointment of persons as officers in the Officers' Reserve Corps and the National Guard of the United States, respectively. These were thus evidently the categories of "other persons appointed as officers" to which the second sentence of the seventh paragraph of section 127a referred. To these were added after the emergency which was declared prior to the outbreak of the war in 1941 all those persons appointed as officers in the Army of the United States generally without component under the authority conferred by the Joint Resolution of September 22, 1941. It appears that a directive issued by the Adjutant General on order of the Secretary of War on November 7, 1941,

required all persons commissioned as officers during the emergency to be appointed in the Army of the United States under that Joint Resolution with exceptions not here material. It follows that the plaintiff's wartime appointment as a captain in the Army of the United States must be held to have been in fact made under the Joint Resolution and not under section 127a of the National Defense Act as erroneously stated in his letter of appointment.

The question remains whether the repeal of the Joint Resolution of September 22, 1941, by section 2a of the Joint Resolution of July 25, 1947, which repeal took effect on July 1, 1948, operated to terminate on that date the plaintiff's appointment as captain in the Army of the United States. We think it is clear that the repeal of the Joint Resolution did have that effect. For the repeal of a law creating an office abolishes the office. *Lewis* v. *United States*, 1917, 244 U.S. 134; 42 Am. Jur. Public Officers § 35; 67 C.J.S. Officers § 10. It is only if its existence is saved by some other legal provision that the office continues in existence after the repeal of the Act which created or authorized it. Here the Joint Resolution of July 25, 1947, which repealed the Joint Resolution of September 22, 1941, did contain, in a proviso to that repeal, a clause saving for a longer period the commissions of certain officers who had completed courses of medical instruction at Government expense. The inclusion of this saving clause in the repealer is, however, a clear indication of the Congressional understanding and intent that other appointments made under the Joint Resolution were not to survive its repeal on July 1, 1948. In reaching this conclusion we are in accord with a well reasoned decision of the Comptroller General. 35 Comp. Gen. 191.

The Government suggests, in the alternative, that the plaintiff's appointment as captain actually terminated on

January 27, 1948, in view of the provisions of section 2 of the Joint Resolution of December 13, 1941, 55 Stat. 800, which, it says, extended his appointment for the period of the existence of the war and the period of six months immediately following its termination, and in the light of the effect thereon of section 3 of the Joint Resolution of July 25, 1947, 61 Stat. 451-452, which declared that its effective date, July 25, 1947, should be deemed to be the date of the termination of the war for the purposes of section 2 of the Joint Resolution of December 13, 1941. The Government concedes, however, that the plaintiff has been credited with service between January 25, 1948, and June 30, 1948, and does not contend that this credit was erroneously given. We, therefore, need not pass upon this alternative contention.

We conclude that the plaintiff's appointment as a captain in the Army of the United States terminated on July 1, 1948, and that he is, therefore, not entitled to the benefit of the period July 1, 1948, to February 23, 1951, in computing his longevity for purposes of determining his pay. The motion of the plaintiff for summary judgment will accordingly be denied and the motion of the Government for summary judgment in its favor will be granted. Plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, Judge, MADDEN, Judge, WHITAKER, Judge, and JONES, Chief Judge, concur.

DIRECTIVE OF SECRETARY OF WAR OF NOV. 7, 1941 AS TO POLICIES RELATING TO APPOINTMENTS IN THE ARMY OF THE UNITED STATES DURING THE EMERGENCY

WAR DEPARTMENT
The Adjutant General's Office
Washington

November 7, 1941.

In Reply
Refer to AG 210.1
(10-8-41)RB-A

SUBJECT: Policies relating to appointments in the Army of the United States under the provisions of Public Law 252, 77th Congress.

TO: The Commanding Generals of all Armies, Corps Areas and Departments, and Chiefs of Arms and Services, and Chiefs of other sections of the War Department Overhead.

1. Effective at once, except as specified below, all persons commissioned as officers during the present emergency will be appointed in the Army of the United States under the provisions of Public Law No. 252, 77th Congress, approved September 22, 1941:

a. Qualified applicants selected for appointment in the Regular Army.

b. Members of the graduating classes of the Senior Division of the Reserve Officers' Training Corps who qualify under current War Department regulations and instructions for appointment in the Officers' Reserve Corps.

c. Qualified graduates of Junior Units, Reserve Officers' Training Corps, established at essentially military schools, who are twenty-one years of age at time of graduation and qualified graduates of such units holding certificates for appointment as Reserve officers, who present such certificates within six months after the time they reach the age of twenty-one years.

d. Members of the graduating classes of Aviation Cadets who, upon graduation, are recommended for appointment as Reserve officers.

2. All applications for appointment in the Officers' Reserve Corps now being processed, or that may be received in the future, that are not in conformity with the above, will be considered as applications for appointment in the Army of the United States under the provisions of Public Law No. 252, 77th Congress, approved September 22, 1941.

By order of the Secretary of War:

E. S. ADAMS
Major General,
The Adjutant General.

Copies furnished:
Office of Secretary of War
Office of Under Secretary of War
Office of Assistant Secretary of War
Office of Assistant Secretary of War for Air
Secretary, General Staff
Executive for Reserve Affairs
A.C.S. G-1
A.C.S. G-2
A.C.S. G-3
A.C.S. G-4

War Plans Division.
Commandant, Army Industrial College.
G.H.Q., Army War College.
Chief of the Armored Forces.
C.G., Air Force Combat Command.
Chief, National Guard Bureau.
The Commandant, Command and General Staff School.
Chief of the Army Air Forces.
C.G., All Air Forces.
Director, Bureau of Public Relations (WD)
The Adjutant General's School.
Director, Selective Service System.
Commandants, all Officer Candidate Schools.

SEC. 1(c) OF EMERGENCY POWERS CONTINUATION ACT OF 1952

Section 1(c) of the Emergency Powers Continuation Act of 1952, (66 Stat. 333; 10 USC 352), reads as follows:

"(c) The President is authorized to continue in effect until and including April 1, 1953, all appointments as officers and as warrant officers of the Army and of the Air Force which under the following provisions of law would terminate after April 27, 1952, and before April 1, 1953:

"(1) Sections 37 and 38 of the Act of June 3, 1916 (Ch. 134, 39 Stat. 189, 190), as amended, (10 U.S.C. 358, 32 U.S.C. 19), and Section 127a of that Act as added by the Act of June 4, 1920 (Ch. 227, 41 Stat. 785), as amended (10 U.S.C. 513)."

JOINT RESOLUTION OF CONGRESS OF SEPTEMBER 22, 1941

The Joint Resolution of September 22, 1941, was as follows:

> That during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: Provided, That any appointment made under the provisions of this Act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: Provided further, That any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service: And provided further, That nothing contained in this act shall be construed to prohibit the appointment of officers in the various components of the Army of the United States in accordance with existing laws." 55 Stat. 728-729.

SECTION 127a OF THE NATIONAL DEFENSE ACT AS AMENDED BY SEC. 20 OF THE ACT OF JUNE 15, 1933

The seventh paragraph of section 127a, of the National Defense Act, as amended by section 20 of the Act of June 15, 1933, was as follows:

> "In time of war any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade, and all other persons appointed, as officers, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: Provided, That an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor." 48 Stat. 161 162.

PRESIDENT'S EXECUTIVE ORDER 10397 OF SEPT. 25, 1952 EXTENDING APPOINTMENTS UNDER NATIONAL DEFENSE ACT

By virtue of the authority vested in me by section 1 (c) of the Emergency Powers Continuation Act (66 Stat. 333), I hereby continue in effect until and including April 1, 1953, all appointments as officers and as warrant officers of the Army and of the Air Force which under the following provisions of law would terminate after April 27, 1952, and before April 1, 1953:

(1). Sections 37 and 38 of the act of June 3, 1916 (ch. 134, 39 Stat. 189, 190), as amended (10 U.S.C. 358, 32 U.S.C. 19) and section 127a of that act as added by the act of June 4, 1920 (ch. 227, 41 Stat. 785), as amended (10 U.S.C. 513).

(2) Section 515 (e) of the act of August 7, 1957 (ch. 512, 61 Stat. 907; 10 U.S.C. 506d (e).

(3) Section 3 of the act of August 21, 1941 (ch. 384, 55 Stat. 652), as amended (10 U.S.C. 591a).

HARRY S. TRUMAN

THE WHITE HOUSE.
September 25, 1952

PRESIDENT'S EXECUTIVE ORDER 10441 OF MARCH 31, 1953 EXTENDING APPOINTMENTS UNDER NATIONAL DEFENSE ACT, AS TO PERSONS MISSING

Continuing in Effect Certain Appointments as Officers and Warrant Officers of the Army and the Air Force

By virtue of the authority vested in me by section 1 (c) of the Emergency Powers Continuation Act, approved July 3, 1952 (66 Stat. 330), as amended, I hereby continue in effect until and including July 1, 1953, all appointments as officers and as warrant officers of the Army and of the Air Force, of persons on active duty on March 31, 1953, who are determined, as provided in the Missing Persons Act (56 Stat. 143), as amended, to have been in a status of missing, missing in action, interned, captured, beleaguered, or besieged at any time after June 25, 1950, and before July 1, 1953, which under the following provisions of law would terminate after April 27, 1952, and before July 1, 1958:

1. Sections 37 and 38 of the act of June 3, 1916 (ch. 134, 39 Stat. 189, 190), as amended (10 U.S.C. 358, 32 U.S.C. 19), and section 127a of that act as added by the act of June 4, 1920 (ch. 227, 41 Stat. 785), as amended (10 U.S.C. 513).

2. Section 515 (c) of the act of August 7, 1947 (ch. 512, 61 Stat. 907; 10 U.S.C. 506d(c)).

3. Section 3 of the act of August 21, 1941 (ch. 384, 55 Stat. 652), as amended (10 U.S.C. 591a).

DWIGHT D. EISENHOWER

THE WHITE HOUSE
March 31, 1953

PROCLAMATION OF LIMITED NATIONAL EMERGENCY OF SEPTEMBER 1939: 54 STAT. 2643

In pertinent part reads

> Now, Therefore, I Franklin D. Roosevelt, President of the United States of America, do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations. Specific directions and authorizations will be given from time to time for carrying out these two purposes

PROCLAMATION OF UNLIMITED NATIONAL EMERGENCY OF MAY 27, 1941; 55 STAT. 1647

In pertinent part reads.

> Now, Therefore, I Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere

PROCLAMATION TERMINATING THE NATIONAL EMERGENCIES, DATED APRIL 28, 1952. 66 STAT C 31

In pertinent part reads

> Now, therefore, I Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941 terminated this day upon the entry into force of the Treaty of Peace with Japan

Dated April 28, 1952. 66 Stat c 31